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IN THE

Supreme Court of the United States

OCTOBER, 1970 Term

No. 985

ROBERT BENJAMIN BLAND, SR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Robert Benjamin Bland, Sr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming his conviction in the United States District Court for the Eastern District of Louisiana of violating 18 U.S.C. § 2313 which prohibits knowingly receiving and concealing a stolen motor vehicle which has been transported in interstate commerce.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not yet officially reported. It is printed in the Appendix to this petition (1a-3a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 25, 1970. A timely petition for rehearing was filed which was denied, without an opinion, by order entered October 23, 1970. (Appendix p. 5a.) The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a jury instruction that possession of property recently stolen, *if not satisfactorily explained*, is a circumstance from which the *jury may find* that the *person* in possession *knew the property was stolen* denies an accused rights afforded him by the Fifth and Sixth Amendments to, and Article III of the United States Constitution in the instance where the property involved is an automobile and the accused testified as to the particular facts and circumstances surrounding the acquisition and possession of such vehicle.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Section 2, Clause 3 of the Third Amendment to the United States Constitution provides in pertinent part:

> "The Trial of all Crimes . . . shall be by jury; . . ."

The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ."

Section 2313, Title 18, United States Code, provides:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

STATEMENT OF FACTS

Petitioner Bland was convicted on a single count indictment charging that he received and concealed a stolen motor vehicle which was moving in interstate commerce knowing that it was stolen, in violation of 18 U.S.C. Sec. 2313.

The vehicle, stolen March 19, 1964, at Tampa, Florida, was in petitioner's possession in New Orleans, Louisiana, on March 23, 1964. (App. 45, 49.) Bland used the car in the conduct of the business of his corporation, of which he was President and in which name the vehicle

was registered in New Orleans, Louisiana, until May 24, 1965, when he was informed by a Special Agent of the Federal Bureau of Investigation that the car was a stolen vehicle. It was not until March 5, 1968, that petitioner was indicted for the offense charged in these proceedings.

Not only was petitioner's knowledge that the vehicle was stolen an essential element to be proven, but the complete absence of such knowledge was the *sole issue tendered the jury* by the defense. Petitioner testified, in great detail, as to each and every particular circumstance relating, and incidental to the purchase of the vehicle from an individual whose actual identity was not known, with all transactions between Bland and this individual not being witnessed by others. (App. 174-205.) No witness was available to the defense, other than the petitioner himself. No one, including the Federal Bureau of Investigation, has been able to ascertain the identity of the individual(s) who stole and/or sold the vehicle. (App. 63.) By reason of such facts, the only person who could possibly explain, satisfactorily or otherwise, Bland's possession of the vehicle so as to convince the jurors that the accused did not know it was stolen was the petitioner himself. Significantly, Bland did undertake to explain the facts and circumstances surrounding the acquisition and possession of the automobile.

Upon request of the Government, although objected to by the defense (App. 164), the following special instruction was given:

> "The possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which you the Jury may reasonably draw an inference and find in the light of the surrounding circumstances shown by the

evidence in the case that the person in possession knew the property had been stolen. The term recently is relative. It has no fixed meaning. Whether property can be considered as recently stolen depends upon its nature and all of the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may be reasonably drawn or explained away." (App. 322.)

REASONS FOR GRANTING THE WRIT

It is constitutionally impermissible to give an instruction that possession of a recently stolen automobile, *if not satisfactorily explained*, is a circumstance from which the *jury may* reasonably draw an inference and *find* that the *person in possession knew* the car had been stolen when the accused himself testifies and seeks to explain the very nature of the circumstances surrounding his possession of the automobile, the belief, or disbelief of which determines the finding of guilt, or innocence.

The accused is entitled to have the jury make a free and unhampered determination of his guilt, or innocence. Article III, Fifth and Sixth Amendments, United States Constitution. The right to trial by jury includes the right to have the jury alone find the facts, and the inferences drawn therefrom, including the crucial one of guilt, or innocence. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15-19, 76 S.Ct. 1, 4-6 (1955). This right to have the jury determine guilt or innocence necessarily includes the right to have the jury alone decide whether the evidence is sufficient to convict.

In The Matter of Samuel Winship, 90 S.Ct. 1068,

1073 (1970) this Court expressly articulated the heretofore assumed, popular assumption that our Constitution compels the "proof beyond a reasonable doubt" standard in criminal trials, stating:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we *explicitly hold that the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.*" (Emphasis added.)

As thus now clearly recognized by this Court, since petitioner's guilty knowledge of the stolen character of the automobile was an essential element of the offense charged, the possession of such guilty knowledge was a fact which was required to be established by proof beyond a reasonable doubt. *In re Winship, supra.*

Prior to taking the witness stand, petitioner had been informed that the Government's requested instruction would be given notwithstanding his objections thereto. Rather than be confronted with the special instruction without presenting evidence, Bland relinquished and surrendered his Fifth Amendment privilege against self-incrimination to avoid the giving of such instruction, electing instead to place his case squarely before the jury on his testimony in reliance upon the Due Process provisions of the United States Constitution which impose upon the prosecution the burden of proving each and every element of the offense beyond a reasonable doubt *without* the impermissible aid and assistance of a "crutch" — i.e., the special instruction not only constitutionally prohibited, but rendered wholly unnecessary

by the general charge which included these instructions, the emphasized portions of which are supplied:

> "On the question of the credibility of witnesses, you, as jurors, are the sole judges of the credibility of each of the witnesses and the weight their testimony deserves. In weighing the credibility of a witness you may consider the circumstances under which he testified and everything about his manner or the circumstances of the case that indicates to you whether or not he is worthy of belief. Even though a witness may be a party to an action and may be, therefore, assumed to be vitally interested in its outcome, you may give credit to his testimony *if it is not contradicted* by direct evidence or *by inferences that may be drawn from the evidence*, and if his evidence is not opposed to probability and is not in its nature surprising or suspicious.
>
> *In evaluating* the *testimony of* any *witness*, whether or not he is a party, you should *consider* his intelligence, *his motives*, his state of mind, his demeanor and conduct while on the stand and any other fact that in your mind suggests that his testimony is entitled either to greater or lesser credibility than the testimony of another witness. Of course, you may take into account the relationship he has to either side of the case, *the manner in which he might be affected by the verdict* and the extent to which, if at all, his testimony is either supported or contradicted by other evidence." (App. 318, 319.)
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> "As jurors . . . you are the sole judges of the facts. However, it will be your duty to *apply the law as given to you in these instructions*

to the facts as you find them from the evidence before you."

• • • • •

"Regardless of any opinion you may have as to what the law ought to be, *you must follow these instructions and apply them* as correctly stating the rules of law that you are to apply in the case." (App. 315.)

• • • • •

"The evidence consists of . . . any *presumptions* that are stated in these instructions." (App. 318.)

• • • • •

". . . [K]nowledge, an essential element here, may be proved by circumstantial evidence, for it can rarely be established any other way. No one knows, of course, what is inside another person's mind, that is what he knows. This is why we say that what is inside the mind may be proved by something that is circumstantial . . . You should consider all the evidence presented . . . together with *all reasonable inferences* that you draw from it . . ." (App. 323.)

The giving of the added "inference" instruction robbed petitioner of at least part of his presumed innocence, cast upon him the burden of proving his innocence, and more significantly, to a marked, substantial extent relieved the prosecution of its absolute, nondelegable burden to prove the esesential element of petitioner's guilty knowledge of the fact that the car was stolen. It denied him due process and a fair, impartial trial. The prosecution can not substitute this instruction to prove the most

critical element of the offense charged and thereby satisfy its burden of proof.

The "inference instruction" was neither justified, warranted nor permissible under the facts of this case. The general charge was more than adequate and sufficient for the prosecution's purpose. Once Bland testified it was within the jury's exclusive province to find his guilt, or innocence unhampered by an "inference charge" with respect to an inference which may be found only by the jurors based on their day-by-day, commonplace experiences.

For an inference of knowledge merely from possession to be sustained, there must be a "rational connection" between the fact proved and the ultimate fact presumed. *Tot v. United States*, 319 U.S. 463 (1943). It must ". . . at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact." *Leary v. United States*, 395 U.S. 6, 36 (1969).

The "rational connection" requirement set forth in *Tot v. United States, supra*, was again illuminated in *United States v. Romano*, 382 U.S. 136, 86 S.Ct. 279 (1965), wherein this Court found that any connection between the defendant's presence at the site of an illegal still (fact proved) and his possession, custody or control of the still (fact presumed) was too tenuous to permit a reasonable inference of guilt, and that the inference of one from the other was unconstitutionally arbitrary.

The simple possession of a recently stolen automobile does not make it more likely than not that the possessor knows the vehicle was stolen. There is no more rational

connection between the two than there is between possession of marijuana and knowledge that it is imported, *Leary v. United States*, *supra*, or between presence at an illegal still and possession, custody and control of that still, *United States v. Romano*, *supra*. In both *Leary* and *Romano* this Court found the inference invalid for the reason it was strained and arbitrary — the fact inferred did not necessarily follow from the fact proven. Similarly, guilty knowledge that an automobile was stolen does not necessarily follow from its possession even though such possession is recent in point of time from its theft. It is not "extremely unlikely" that such possession is legal. *Turner v. United States*, 90 S.Ct. 642 (1970).

An inference must be measured by the "circumstances of life as we know them." *Tot v. United States*, *supra*. Reason and experience must make it *more likely than not* that the fact inferred follows from the fact proved. A blanket inference of guilty knowledge from mere possession of a recently stolen automobile fails to meet this standard. There are simply too many plausible explanations for one's possession of an automobile, even though recently stolen, to permit an "inference instruction" to supply proof of an element of the offense and thereby satisfy the prosecution's burden of proof. There is more than a reasonable possibility that the automobile may have been loaned, sold, or it may have been the object of a trade. An automobile, unlike heroin, but identical to cocaine, may be legitimately possessed by one in various ways. The reasonable possibility of such lawful possession renders invalid this "inference charge" in the light of this Court's holdings in *Leary* and *Turner*.

That there are varying circumstances and situations affecting the validity vel non of statutory presumptions and inferences seems clearly discernible from the jurisprudence cited. One factor, and perhaps the most significant, is the *nature of the object possessed.* If such object, the possession of which is clearly illegal, be of a nature such as heroin, contraband, or the like, the "inference" is permissible.

However, should the nature of the object be such that its possession may reasonably have been obtained by lawful means, as cocaine, or an automobile, it is constitutionally impermissible to instruct that merely by virtue of such possession the jury may find that the possessor knew the vehicle was stolen *unless the possession is satisfactorily explained.*

The law never imposes upon an accused the burden, or duty of calling any witness, or producing any evidence. *Adjmi v. United States*, 343 F.2d. 164 (5th Cir.), *cert. denied*, 382 U.S. 823 (1965); *United States v. Turner*, 404 F.2d. 782 (1968), modified on other issues, 396 U.S. 398 (1970).

The petitioner, at the time of trial, was clothed with the presumption of innocence. It was incumbent upon the prosecution to prove his guilt beyond any reasonable doubt as to each element of the offense. *In re Winship, supra; Turner v. United States, supra.* The enforcement of the presumption of innocence is elementary and lies at the foundation of the administration of criminal law. *In re Winship, supra.*

The presumption of the innocence of an accused is as

basic and important as his privilege not to testify. Permitting the effective exercise of an accused's privilege to dispense with evidence demands, at the very least, that adverse inferences on the part of the jury be prohibited by instruction. In petitioner's case the compaint is not the failure to instruct, but, rather, the actual giving of an instruction which destroys the exercise by the accused of his constitutional privilege to elect not to produce evidence.

Moreover, as noted earlier, proof beyond a reasonable doubt as to each element of the offense has now been recognized as a Constitutional requirement in a criminal case. *In re Winship, supra.* Adherence to this principle demands that the accused be completely free to rely on the requirement that the Government must prove its case, and that he be completely free either to put on a case, or to rest without adducing evidence. These rights are so closely interwoven with the "reasonable doubt" test of *Winship, supra*, as to be an integral part of it. It would be completely meaningless to say that although guilt must be proven beyond a reasonable doubt, an accused is nevertheless compelled to present a case and satisfactorily explain circumstances involved therein.

The privilege of presenting no defense is now definitely of constitutional stature as espoused by this Court. As such, this privilege requires rigorous protection. We further represent that an accused is never, *under any circumstances*, compelled to explain, satisfactorily or otherwise, any facet of the case presented against him. A fortiorari, any instruction which effectively compels either testimony of the accused, or requires production of evidence by the defense is constitutionally proscribed.

The "rational connection" between the fact proved and the ultimate fact presumed must be found based upon common experience. This determination is one to be made by, and is exclusively within the province of the jury which was more than properly and adequately instructed as follows:

> "You are to consider all the sworn testimony that you have heard together with the exhibits and the stipulations. Of course, in considering testimony you are not limited to the bold statements of the witnesses standing alone. On the contrary, *you are permitted to draw from the facts that you find have been proved such reasonable inferences as you think are justified in the light of your own experience.*" (App. p. 318 — emphasis supplied.)
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> "You should consider all the evidence presented in the case by both the Government and the accused *together with all reasonable inferences that you draw from it. . .*" (App. p. 323 — emphasis added.)

CONCLUSION

The constitutional rights of an accused to have the jury alone find the facts, as well as all inferences to be drawn therefrom, and to be protected against conviction except upon proof beyond a reasonable doubt of each and every element of the offense for which he is charged are violated by the giving of the "inference instruction" complained of herein.

For such reasons, the Writ should be granted.

Respectfully submitted,

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